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The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures

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In this article we argue for an empirical governance approach—the use of public evaluations—as one basis for deciding whether and how to regulate decisions with public consequences. We propose a conceptual framework for evaluating public acceptability, notably that public judgments should be evaluated against five criteria: overall acceptability *ex ante*; robustness; consensus; procedurality; and their ranking on nonfairness issues such as cost and convenience. In the article we also move beyond theory to implementation by modeling our framework to evaluate public judgments concerning acceptability in the contentious area of land-use decisions in Florida.

Data from a survey of Florida stakeholders offer several interesting findings about five procedures currently in use to make land-use decisions: private negotiation; public hearings conducted by elected local officials; administrative law hearings; judicial adjudication; and public referendums. Based on the above five criteria, judicial adjudication is evaluated as the most desirable of these procedures through which to govern land-use decisions. Respondents view judicial and administrative adjudication differently, a finding that raises important questions concerning the appropriate roles for, and structure of, administrative and judicial adjudication. Referendums receive mixed reviews, while public hearings, the most common form of decision-making procedure in the land-use arena, are the least acceptable. In short, as the article details, our findings in the specific context of land-use decision-making procedures raise interesting and important questions about the most appropriate procedure through which decisions should be made in this arena and whether there are ways to revise procedures to improve their acceptability to the public. Further, the

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findings raise important questions across policy arenas about the appropriate use and structure of different types of decision-making processes.

Our more general objective is to offer a framework for using empirical governance to consider and, ultimately, enhance the public acceptability of government decision-making processes. Our basic premise in this project is that to further good governance, government should make decisions using procedures in which the public has confidence and that will increase public acceptance of such decisions.

I. INTRODUCTION

This article explores public views concerning the acceptability of different procedures for making land-use decisions, based on responses to a survey we developed for stakeholders in Florida communities in which these land-use decisions are to be made. Each respondent is asked to indicate his or her willingness to accept the results of alternative procedures for making land-use decisions—four procedures in which a decision is regulated in some manner by the larger community, and one procedure involving unregulated negotiation among the parties directly involved in the land at issue.

The study begins with the premise that if decisions that affect the public are to be regulated, it is important to consider public views about how that regulation should occur. One obvious criterion is whether people indicate that a particular form of regulation will produce decisions that they are willing to accept, that is, that the procedure would be authoritative. Our analysis also considers four additional potentially important criteria beyond authoritativeness by which procedures for making land-use decisions might be evaluated: whether the procedure is robust in the face of experience (i.e., whether ex post evaluations differ from those that are ex ante); whether there is a consensus among major community stakeholders about the desirability of a procedure; whether the procedural has procedural¹; and whether the procedure is strong or weak on nonfairness issues that affect preferences (e.g., delays and costs associated with a process). Procedural¹ involves two features. First, that the procedure *is not* evaluated as acceptable based simply on its likely outcome. Second, that the procedure *is* evaluated as acceptable based on the features of procedural fairness that it displays.²

An analysis of the respondents' views about the five procedures through this larger conceptual framework suggests that judicial adjudication is the preferred procedure for

¹The term "procedural¹" is used in technical discussions of computer programs to refer to the framework of the rules that define how a program is executed. In other words, it refers to the procedural features of how a program is executed, rather than to the outcomes produced. We use it here to emphasize the focus on how a procedure functions, not its outcomes. As we note, studies have repeatedly shown that people distinguish between how procedures function and the outcomes they produce, although they typically see the two issues as related.

²As is often the case, there are different options for defining each of these criteria. For example, some have suggested that it is appropriate to subsume the costs of procedures within the category of procedural justice rather than treat them separately as we do here (Solum 2004). Following this approach, our framework would consist of four criteria rather than five. We explain in Section III.D why we prefer the five-part framework we have proposed in which we separate nonfairness concerns (delay, cost, etc.) from traditional procedural justice issues (e.g., quality of treatment, neutrality).

regulating land-use decisions, at least in comparison to the other procedures studied in this survey. As we detail below, each of the other procedures has various strengths and weaknesses when viewed through this framework. Moving beyond the arena of land use, the article concludes by considering the implications of the findings, and framework, for developing a general model of empirical governance.

The procedural justice literature provides one lens for considering issues of institutional design. From the perspective of effective and efficient conflict management, it is important to resolve disputes through procedures that maximize decision acceptability. One example of the importance of procedural justice research in the area of institutional design is the widespread development of alternative dispute resolution programs such as mediation (Tyler 1989). Although there are multiple approaches to mediation and generalization is risky, studies have found that mediation is desirable, at least in some circumstances, because disputants are more willing to defer to decisions made by mediation than they are to adjudication decisions (Sternlight 1999; Tyler 1989). Hence, institutional designs can be shaped by an understanding of the consequences of resolving disputes in different ways, consequences determined at least in part by postuse deference by the parties involved.

Our goal is to broaden the scope of subjective evaluations used in institutional design (see Tyler 2008). We believe that the views of people in the community are also important in making *ex ante* decisions about which procedures will be used to make decisions. This means that public views would be used during the initial development of procedures to decide what procedures would be in place in a community when decisions need to be made at some later date. Taking account of public views involves *ex ante* judgments of how decisions should be made in the future rather than relying on postuse satisfaction. In making such judgments, people are making general decisions about how they want their community to be regulated. We refer to the use of subjective *ex ante* judgments when making procedural choices as “empirical governance” because our focus is on incorporating public views into decisions about the appropriate procedures for managing decisions in the community.

Our framing of the institutional design question follows the early efforts of Thibaut and Walker (1975), who were concerned with choices among trial procedures. Their study compared subjective views about the inquisitorial and adversary trial procedures. They studied both *ex ante* and *ex post* judgments. Their findings suggest that prior to using a procedure, people prefer an adversary trial. Further, after experiencing trials, people are more willing to accept the results of an adversary trial. Hence from their perspective, those people personally involved in disputes prefer the same type of procedures both *ex ante* and *ex post*. Other studies have raised questions about this conclusion, demonstrating that people focus on different issues when they evaluate procedures *ex ante* and *ex post* (Tyler et al. 1999). In particular, Tyler et al. found that people involved in disputes are more strongly influenced by procedural justice issues in *posthoc* evaluations.

Our concern in this study is with the abstract *ex ante* judgments people make about how to make future land-use decisions in their community. These evaluations reflect general judgments about how communities should manage private decisions that also have collective consequences for the community. The people interviewed are not asked about a decision concerning land use in which they are directly involved and that would be made

by one or another of the procedures; rather, they are making abstract judgments about how their community should decide future land-use questions.

People within our society operate within a framework of private property within which they enjoy considerable freedom to act as they wish. For example, property rights broadly entitle community residents to use their property as they wish; to buy and sell that property if they desire and for a price they negotiate and agree to with other parties. However, like most private rights, property rights are exercised within a framework of rules through which the public interest is expressed via the regulation of private decisions and actions. At the most fundamental level, it is important to ask whether the public views such regulation as acceptable. By acceptable we mean that people indicate a greater willingness to accept the decisions made through a procedure involving public control than to accept decisions made via private negotiation. To the degree that public control is accepted, we want to identify the procedures through which the public would like to see that control exercised.

A large body of research supports the argument of the procedural justice model, that is, the argument that people's reactions to their experiences with legal authorities are strongly shaped by their subjective evaluations of the justice of the procedures used to resolve their case (Lind & Tyler 1988; Tyler 2006a; Tyler & Huo 2002). The procedural justice literature has generally focused on people with personal experiences with legal authorities and has been concerned with their postexperience evaluations of the legal system and willingness to accept its decisions. This literature, which might therefore be broadly characterized as a literature on postuse "consumer satisfaction," demonstrates that people are strongly influenced by the justice of the procedures they experience when they go to court or deal with the police. As noted, our goal is to broaden the use of subjective evaluations in institutional design. We believe that the views of people in the community are also important in making *ex ante* decisions about which procedures should be used to make decisions.

Our particular focus is on land-use decisions made within different communities within Florida. Our question is how people in these communities prefer to deal with regulating the land-use decisions made in their communities. We are interested in identifying the procedures that people feel lead to acceptable land-use decisions. We contrast private ordering via negotiation among the affected parties to four procedures that involve some form of public regulation. Those four regulatory procedures are: via public hearings by local elected authorities; via hearings by administrative law judges; via judicial adjudication; and via public referendums.

We evaluate land-use procedures against five criteria of acceptability. The first is public willingness to accept the results of a procedure. The second is the robustness of the procedure in response to personal experience. Third, we ask whether there is a consensus among stakeholders in the community concerning the acceptability of a procedure. Fourth, we consider whether the acceptability of a procedure is based on two concerns: the estimated likelihood of prevailing through the procedure and the degree to which the procedure has the features associated with a just procedure. Fifth, we consider nonfairness-related issues such as the costs of participating in a procedure, delays associated with different processes, and the like.

After applying these five criteria to the five procedures we conclude that people view judicial adjudication as the most appropriate procedure of the five we reviewed for regulating land-use decisions, and prefer it not only to the other public procedures, but also to private negotiations. More broadly, we suggest that the five criteria we define provide a framework within which empirical governance should occur. That framework is based on five primary dimensions: acceptability, robustness, consensus, procedurality, and nonfairness concerns.

II. CONSIDERING PUBLIC ENGAGEMENT AND OVERSIGHT CONCEPTUALLY

A. Public Control of Land-Use Decisions

In many situations, land-use decisions have implications for the community. If a farmer sells his land to someone who builds a shopping center, a developer tears down an old home and builds two new and larger houses on that lot, or the government builds a new school or sites a landfill, these decisions impact the public, which deals with problems such as traffic congestion and with the need to provide increased sewage, schools, fire, police, and other support services, which may increase taxes, have adverse environmental consequences, or otherwise affect the quality of life. Hence, in such situations, the public may view regulation as desirable and endorse its use. To borrow from the economics literature, people may be especially likely to favor regulation in situations that involve externalities of various types (Polinsky & Shavell 2000).

Beyond this, a variety of literatures generally suggest the value of public engagement in community planning and environmental decisions. There are normative reasons for believing that public involvement in decision making is valuable, and calls for increased public involvement have become louder and more pressing in recent years (Carpini et al. 2004; Markell 2005; cf. Hibbing & Theiss-Morse 2002). Thus, even though psychologists argue that people generally prefer to have as much freedom as possible to conduct private transactions such as buying and selling at prices that they have freely negotiated with others (Thibaut & Walker 1975), the call for greater public participation in environmental decision making is hardly a new idea (Charnley & Engelbert 2005; Halvorsen 2001; Hunt & Haider 2001; McFarlane & Boxall 2003; Stephan 2005; Weber & Tuler 2001). On the contrary, calls for increased public involvement are widespread. Our concern is with the manner in which such public involvement occurs, that is, with the procedures by which the public or its representatives regulate private transactions. We address several questions. First, does the public want to be involved in the process of land-use management, as opposed to leaving such decisions to negotiation among the directly involved parties? Second, if so, what types of third-party procedures are most desirable?

B. Criteria for Evaluating Procedures: An Overview

There are a wide variety of procedures through which the public could potentially have a role when land-use decisions are being made. Some of those procedures provide

an oversight role to societal authorities, as occurs when political or legal authorities make decisions, while others involve direct public involvement, for example, in public comment procedures for public hearings or a public referendum. How can those various alternative procedures be evaluated? One approach is to evaluate procedures against normative criteria.

Within law, normative approaches to procedural evaluation are widespread (see Solum 2004). Solum argues that procedural rules can be defined on philosophical terms and, when that is done, three principles are key. The first principle is participation, that each party has the right to meaningful participation (2004:305). The second principle is accuracy, with procedures designed to maximize the likelihood of achieving the legally correct outcome (2004:305). Finally, the third principle is that in cases of conflict, participation is more important than accuracy (2004:306). In each case, procedures are chosen to achieve these objectives based on their philosophical features, not in terms of public evaluations. Solum indicates that “satisfaction with the process is not the whole story about procedural fairness,” but also observes that “[t]his narrow point does not force the conclusion that litigant satisfaction is unimportant or that it should not be considered in the evaluation and comparison of specific procedures” (2004:266–67). In short, there is more to procedural design from this perspective than public evaluations of procedures. However, it is equally true that Solum, like many legal scholars, views public reactions to procedures as relevant to their desirability. In other words, public views should be included in some way when procedures are being designed.

Like Solum, we believe that a procedure’s desirability lies, at least in part, in issues of public satisfaction. Our goal here is to develop a framework within which we can evaluate different procedures for exercising public influence over land-use decisions through a subjective framework that is based on the views of the public. The framework we propose involves five dimensions: acceptability, robustness, consensus, procedurality, and nonfairness concerns.

1. Acceptability

Our first criterion for evaluating procedures for making land-use decisions is whether people accept the results of the procedure. This ability to gain acceptance is one aspect of legitimacy (Tyler 2000a, 2000b), for example, the capacity of a process to produce decisions to which people are willing to defer. From our perspective, authoritativeness, the ability to make decisions that resolve issues, is central to the effectiveness of law and that capacity is our focus in this analysis.

Our concern is with the evaluations of acceptability made by the public. The willingness to accept decisions is important because a core function of decision-making procedures is to resolve problems in ways that are acceptable to the people affected by those problems. If people do not accept the outcome, they may object to the procedure and continue to protest and seek to undermine its implementation. Further, the implementation of the agreement will sour people’s relationships and undermine their cooperation, which is contrary to a key goal of the legal system: to foster good feeling and the mutually beneficial exchanges that flow from it (Hibbing & Theiss-Morse 1995, 2002).

Our general argument is that procedural acceptability is important because when a procedure has it, it is able to be authoritative, engendering deference concerning its suitability for dealing with the question and making decisions to which people will defer.

The argument that people's willingness to defer to a procedure's decisions is linked to their views concerning the procedures by which those decisions are made and implemented is widely supported by research on legal (Paternoster et al. 1997; Pruitt et al. 1993; Sunshine & Tyler 2003; Tyler 2006b; Tyler & Fagan 2008; Tyler & Mitchell 1994), political (Grimes 2006; Hibbing & Theiss-Morse 1995, 2002; Tyler et al. 1985), managerial (Elsbach 2001; Tyler & Blader 2000), and environmental (Hunt & McFarlane 2007; Manger et al. 2000; Mueller et al. 2008) decision-making procedures.

So, as a beginning point, we suggest that the desirability of procedures can be evaluated in terms of the degree to which people are willing to accept them and the outcomes they yield. We test such willingness by examining whether any of four forms of public procedure is more acceptable than negotiation, a finding that would show that the public is more willing to view as acceptable decisions made through procedures that take account of community concerns. Our test is both absolute, in that we ask people how acceptable the results of each of the procedures are, and relative in our comparison of that acceptability to the acceptability of other public procedures and to negotiation among the directly affected parties.

2. Robustness

We further argue that it is desirable to have procedures that retain their acceptability after they are directly experienced. This is the case because procedures that are put in place within a community will, over time, be experienced by ever greater numbers of people. If the experience with a process undermines its acceptability, then the process will not be sustainable over time, since the very implementation of such procedures in the community creates the basis for objections being raised about them. For a procedure to be sustainable as an approach to managing issues of land use, it must be usable without being undermined. Robustness refers to such sustainability. Inclusion of this *ex post* check on *ex ante* preferences as part of our framework is quite rare in the literature and is an innovation in design that warrants careful thought for future research. A recent study of both *ex ante* and *ex post* evaluations of dispute resolution procedures suggests both that *ex ante* preferences do not necessarily predict *ex post* satisfaction and, moreover, the accuracy of predictions of *ex post* acceptability based on *ex ante* views may vary by procedure (Shestowsky and Brett 2008; Utset 2003).

An example of the issue of procedural sustainability is found in recent responses to terrorism. Law enforcement agencies have engaged in a number of practices that are more intrusive than was typical when policing against crime was their major goal. For example, they search handbags on subways, question people in their homes about links to terrorists, and question community leaders in their neighborhoods. Such policies have led to an increase in the number of people in the community who have personal experience with police practices. If the consequence of such experience is to view the police more negatively, then the practices are not sustainable in the long run (Jenkins-Smith & Herron 2005).

Similar, but less dramatic, effects occur in the everyday interactions people have with the legal system. If people resent personal encounters with the police, then, over time, their support for law and cooperation with the police is undermined (Tyler & Fagan 2008). If people leave the courts dissatisfied with trial procedures, they will both lose their respect for the legal system and will, in the future, seek nonjudicial ways to resolve their disputes. Hence, a key issue is whether the use of a procedure shapes evaluations of its acceptability.

An example of an effort to examine the robustness of court procedures is provided in a statewide evaluation of the courts conducted in California (Rottman 2005). This study is based on a sample of the residents of California. It considers the influence of knowledge about the courts gained by personal experience and the media on judgments about the courts. The most common form of experience was jury duty. Overall, this study found that personal experience with the courts as a juror increased confidence in the courts, while experience as a litigant lowered approval of the courts. The findings illustrate a potential problem of legal procedures: that direct experience can undermine confidence in the law and, more generally, in societal governance.

More broadly, a key issue is how public views are shaped. From a public policy perspective, what is important is that a procedure be sustainable and, hence, robust to influences of the social environment. In a situation such as land-use decisions in Florida, the decisions made by any particular procedure often have widespread dissemination in the community via both informal social networks and the mass media. A procedure that becomes illegitimate as people become aware of its implementation is not robust.

To test the robustness of procedures in the face of personal experience, we compare users and nonusers of each procedure. If those who have past personal experience with a procedure indicate willingness to accept its outcomes, this suggests that the procedure will continue to be legitimate if it is widely adopted in a community and afterward generally experienced by community members. In our analysis, we consider two issues: first, the respondents' personal familiarity with a procedure through their own use; and second, respondents' familiarity with a procedure because others (e.g., members of one's family, friends, and/or neighbors) have used the procedure. This second issue reflects the impact of informal social networks.

3. Consensus

Third, we suggest that consensus is a desirable quality for a procedure. If a procedure's legitimacy is not widespread within a community, it will be less effective in bridging differences. For example, Tyler (1994, 2000a) demonstrates that the basis for evaluations of the courts does not differ across demographic categories. As an example, rich and poor respondents evaluate the courts in the same manner, placing identical weight on issues of procedural justice and defining it in similar ways.

To assess consensus in this study, we examine the degree to which legitimacy varies as a consequence of ideology, ties to the community, interests, and/or demographics.

In the case of ideology, our suggestion is that a procedure is more desirable if it is acceptable to people across the ideological spectrum. In this study, we consider three aspects of ideology. First, judgments of procedures may differ depending on whether

respondents generally have a liberal or a conservative ideology. The same judgments may differ depending on the extent of the respondent's trust in government. We measure trust at the local and state levels. Third, we ask about trust in nongovernmental organizations (NGOs) and the development community. In each case, we suggest that a strong procedure is one that is acceptable to people at all points of the ideological spectrum, rather than to one particular group.

A second important issue is the degree to which respondents are psychologically connected to their local community. Tyler and Degoe (1995) argue that the nature of people's identification with their community alters their relationship to government and government procedures. In particular, people who are more identified with their communities are less motivated by self-interest and more motivated by their judgments of what is procedurally fair. Hence, people who differ in their degree of involvement with their local community may view different types of procedures as most appropriate for resolving community issues such as land use. In a study of water-allocation procedures, Tyler and Degoe (1995) found that those who identified with their community more strongly favored allowing government authorities to make water-allocation rules.

Third, we evaluated consensus by examining respondents' self-interests. People whose position in the community differs, for example, environmental activists versus developers, have different goals and varying definitions of a desirable outcome.

Four possible positions in the community are distinguished: government official; citizens' group member/environmentalist; property owner/businessperson/developer; or attorney/consultant.

Finally, we consider standard demographic information: race, income, education, gender, and age.

4. Procedurality

A fourth criterion against which we can evaluate procedures involves procedural acceptability. Here, our concern is not with whether people will accept the results of a procedure, but with why.

Theorists of procedural justice argue that we want to have procedures that are accepted for their procedural qualities, not their anticipated outcomes (Tyler 2006b). In other words, if everyone involved chooses a procedure and says they will accept its outcome because they anticipate that the outcome will be the one they want, then after they actually experience that procedure in a conflict situation, at least some people will be disappointed, since it is unlikely that everyone can win. If, on the other hand, for example, they prefer a procedure because they believe that it is just on procedural grounds, then it is easier to imagine that everyone would be able to feel that the procedure considered the facts and was acceptable, irrespective of its ultimate outcome.

We argue that procedures that encourage people to accept their outcomes due to the nature of the procedure itself are more desirable. Following Easton (1965), we will refer to such procedures as having a "cushion of support" for decisions. Over the last 20 years, a large psychological literature has suggested that people are strongly influenced by their assessments of the procedural justice of different methods of allocation and conflict

resolution. A clear example of such a procedure is the adversary trial. Research shows that people accept whatever verdict is reached in such a trial to a certain degree because they judge it to be a fair procedure on procedural grounds, since it allows both parties to present their case to a decisionmaker in advance of decisions and because the decisions made are believed to reflect the neutral application of clear and consistent rules (Thibaut & Walker 1975). A number of studies have shown that judgments about the justice of the procedures used to resolve conflicts have a strong influence on feelings about and willingness to accept decisions (Lind & Tyler 1988; Tyler 2006b). The literature on procedural justice is robust and suggests a powerful tool that authorities can use to facilitate dispute management.

Such subjective procedural justice judgments have been the focus of a great deal of research attention by psychologists because they have been found to be a key influence on a wide variety of important group attitudes and behaviors (Lind & Tyler 1988; Tyler 2006b). Procedural justice has been especially important in studies of decision acceptance and rule following (Tyler 2006b). One reason that people defer to rules and authorities is that they receive desirable rewards for cooperating and/or fear sanctioning from the group for not cooperating. An alternative reason that people might comply is that they are motivated by their sense of justice to accept what they feel is fair, even if it is not what they want (Tyler 2007).

A key question is whether justice is effective in resolving conflicts and disagreements when people cannot have everything they want. To the degree that people defer because allocation decisions are seen as fair, justice is an important factor in creating and maintaining social harmony. Research suggests that social justice can act as a mechanism for resolving social conflicts, and that procedural justice is especially central in such situations (Tyler 2006b).

As we have noted, John Thibaut and Laurens Walker conducted the first experiments designed to show the impact of procedural justice (Thibaut & Walker 1975). Their studies demonstrated that people's assessments of the fairness of third-party decision-making procedures predicted their satisfaction with outcomes. This finding has been widely confirmed in many subsequent laboratory and field studies of procedural justice, studies showing that when third-party decisions are fairly made, people are more willing to voluntarily accept them (Tyler 2007). What is striking is that such procedural justice effects are widely found in studies of real disputes, in real settings, involving actual disputants, and are found to have an especially important role in shaping adherence to agreements over time.

In this analysis, we address two questions. First, do people prefer a procedure because they believe that they are likely to win if that procedure is used? For purposes of this article, from our perspective, a desirable procedure is one that is not chosen because of its likely outcome. Second, do people prefer a procedure because of procedural qualities? We argue that this is a desirable attribute.

5. Elements of Procedural Justice

In the prior section, we argue that procedural justice matters. To explore the influence of procedural justice, we need to define and measure procedural justice. Procedures can be viewed as fair for different reasons. The two core reasons that studies of procedures suggest

people use to decide whether procedures are fair are: quality of decision making (voice, neutrality) and quality of treatment (trust, courtesy/respect) (Blader & Tyler 2003a, 2003b). In this analysis, we will not focus on any particular procedural element, but will consider the general influence of procedural justice. To do so, we will use a scale that combines measures of these four elements.

a. Voice/Representation. People want to have the opportunity to present their side of the story in their own words before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their perspective has a positive effect on peoples' experience with other parties irrespective of the outcome, as long as they feel that the authority sincerely considered their arguments before making a decision. This desire for voice is found to be one of the reasons that informal procedures, such as mediation, are very popular. People value the chance to communicate with the mediator, indicating how they view the problem and making suggestions concerning how it should be handled.

b. Neutrality. People bring their disputes to third parties because they view them as neutral, principled decisionmakers who make decisions based on rules and not on personal opinions, and who apply rules consistently across people and cases. To emphasize this aspect of procedural justice, third parties should be transparent and open about what the rules are, how the rules are being applied, and how decisions are being made. Explanations emphasizing how the relevant rules are being applied are helpful.

c. Respect. Authorities, whether police officers, court clerks, judges, or fellow citizens, communicate important messages to people about their status in society. Respect for people and their rights affirms to people that they are viewed as important and valuable, and are included within the rights and protections that form one aspect of the connection that people have to society, government, and law. People want to feel that when they have concerns and problems, both they and their problems will be taken seriously by others. Respect includes both treating people well, that is, with courtesy and politeness, and showing respect for people's rights.

d. Trust. Studies of third-party authorities consistently show that the central attribute that influences public evaluations of authorities is an assessment of the character of the decisionmaker. The key elements in this evaluation involve issues of sincerity and caring. People decide whether they believe that third parties, such as judges, are considering their views; are being honest and open about the basis for their actions; and are trying to do what is right for everyone involved.

6. Nonjustice Issues

Of course, not all the issues related to procedures are justice issues. In fact, discussions of public discontent with the courts often point to issues such as cost and delay, rather than issues of injustice (Tyler 2001). Public discussions of the courts often assume that public discontent is linked to issues of cost and delay and, indeed, when interviewed, people often

volunteer such reasons when explaining their views about the courts. We will also examine the influence of these issues on acceptability. We will consider whether nonfairness issues shape acceptability and, if so, whether that influence changes depending on the procedure.

C. Empirical Governance as a Goal

The specific focus of our study is land-use decisions, but our intention is to raise a larger set of issues that are relevant to empirical governance (Markell & Tyler 2008). Our argument is that public views should be an important element in efforts to design legal procedures because of the importance of process in increasing or diminishing legitimacy. Taking that argument seriously requires that we develop a framework within which to evaluate public views.

The goal of this project is to offer the beginnings of a framework of empirical governance and to use it to examine land-use decisions in Florida. However, beyond that, our goal is to argue that empirical work should inform process design more generally, particularly when it comes to developing government processes intended to enhance citizen participation and, hopefully, contribute to rather than detract from the legitimacy of our system of governance.

III. THIS STUDY

The goal of this study is to evaluate the procedures outlined against the criteria we have discussed. To do so in an arena that matters, we chose land-use decisions, a highly contentious issue in Florida communities. Further, the respondents included community members representing perspectives ranging from property owners to environmentalists.

A. Methods: Our Sample

The questionnaire was posted on a website and interested parties were invited to complete it.³ A number of groups were contacted and shared information about the web link with their members and others who receive their newsletters or are on their listserves. Several leading organizations were very helpful and shared the questionnaire with their constituents via listserves and other means. These included: (1) the leading organization in Florida for lawyers in the field, the State of Florida Environmental Law and Land Use Section;⁴ (2)

³The authors will provide interested readers with a copy of the questionnaire. Please email either of the authors. The questionnaire is also available on the publisher's website.

⁴The Section is comprised primarily of attorneys and also has affiliate members in related disciplines. The Section representative indicated that the listserv goes to approximately 1,200 people. Almost all are ELUL Section members. Approximately 100 are affiliate members. These individuals represent the gamut of interests in the land-use arena.

the leading state association for planners, the Florida Chapter of the American Planning Association;⁵ (3) the state agency responsible for overseeing land-use regulation in the State of Florida, the Department of Community Affairs, which sent the survey to the 11 state regional planning councils;⁶ (4) the Florida League of Cities, which represents the 400+ cities of Florida;⁷ (5) the Florida Home Builders Association, a leading trade group for developers;⁸ (6) 1000 Friends of Florida, a statewide organization with a significant focus on land use;⁹ and (8) Tallahassee-Leon County Citizens United for Responsible Growth, a local citizens' organization interested in land use.¹⁰ Because the information was widely circulated, it is not possible to calculate a response rate. A total of 228 people responded to the questionnaire.

Standard demographics were measured: age, gender, income, education, and ethnicity. The demographics of the sample suggest that a range of stakeholders responded. The sample was 7 percent 16 to 34 years of age; 11 percent 35–44; 27 percent 45–54; 39 percent 55–64; and 17 percent 65 or over. It was 45 percent female. The income distribution was 55 percent under \$100,000 and 45 percent above. Sixteen percent had some college or less; 21 percent were college graduates; 27 percent had Master's degrees; 8 percent Ph.D.s; and 21 percent professional degrees; 87 percent were white. As is clear, this was not a random sample of the general population, but a sample of elites.

Respondents were asked about their familiarity with different procedures in the context of making land-use decisions. Of those who completed the questions, 86 percent indicated personal experience with private negotiations; 96 percent with public hearings; 67 percent with administrative litigation; 52 percent with judicial legal procedures; and 41 percent with public referendums. As a result, this sample of elites likely had a relatively good familiarity with the processes we studied.

⁵The Florida APA is a "non-profit organization funded through membership dues and fees." Its listserve includes a total of more than 3,000 individuals. The Florida APA notified its members via its October 30, 2008 monthly bulletin and also included a notice concerning the survey in its quarterly publication, *Florida Planning*.

⁶The Director of Intergovernmental and Public Affairs for the State Department of Community Affairs (DCA) sent an email to the 11 RPC executive directors on our behalf and we followed up with an additional email to the RPC directors. See § 20.18, Florida Statutes (2008) for a summary of DCA's role as the State of Florida's land planning agency.

⁷The Council published the notice in its *Datagram*, a newsletter sent to several hundred municipalities. October 10, 2008 email from Rebecca O'Hara to David Markell (on file with the authors).

⁸We asked all organization representatives with whom we talked to share with us the note they sent their members/constituents and also to let us know how many people would likely receive the notice. The Florida Home Builders Director of Government Affairs indicated that he was making it available to members who might wish to comment. October 28, 2008 email from Doug Buck to David Markell (on file with the authors).

⁹1000 Friends indicates its listserve includes about 1,200 individuals.

¹⁰We asked several other groups to send out a notice about the survey via their listserve or otherwise, but our understanding is that they did not do so.

B. Methodology

1. Survey of Land-Use Decision-Making Procedures

The procedures about which respondents were asked were presented at the beginning of the survey. The procedures were:

- *Informal meetings to negotiate a resolution to conflicts.* It is sometimes possible to have informal meetings with . . . interested parties to discuss possible land-use changes. Areas of possible conflict are resolved informally among the various interested parties.
- *Public hearings—Local government officials.* Elected local officials typically hold public hearings in considering whether to amend a general comprehensive land-use plan and in considering a rezoning request. These hearings allow people to present their views orally and to submit relevant information in writing. Decisions are made based on the views of elected officials about what is best for the community (1000 Friends of Florida 2004).
- *Administrative hearings.* A person affected by a comprehensive plan amendment decision may file a petition for an administrative hearing convened by the State's Division of Administrative Hearings (DOAH). Those who are affected may represent themselves or be represented by counsel and may offer evidence through witnesses and cross-examine other witnesses. Decisions are made based on the consistency of the proposed land use with rules and regulations about land use (Manry 2008).
- *Court challenge.* After a local government body makes a rezoning or other development decision, in some situations it is possible to go to circuit court to challenge the decision. This challenge would argue that the decision is inconsistent with the comprehensive plan or existing laws on zoning. Decisions are made based on the consistency of the planned land use with the comprehensive plan or existing laws on zoning (Powell 2006).
- *Ballot referendum.* Before a land-use change is approved in some jurisdictions, the jurisdiction puts the issue on the local ballot and allows the public to vote it up or down. Decisions reflect the desires of the majority of voters.

2. Questionnaire

Respondents were asked the same questions about each of the five procedures outlined above.

a. Acceptability. People were asked about their willingness to accept the decisions made using the procedure to measure the degree to which a procedure was authoritative. They were asked to agree-disagree that: "I would be willing to accept the results of this procedure." Responses were recorded on a six-point scale ranging from "strongly disagree" to "strongly agree."

b. Robustness. We asked two questions to explore the impact of familiarity with a procedure on preferences: "First, which of the following procedures have you had experience with in

dealing with a land use situation?" The response scale was: "used over five times"; "used 3–5 times"; "used 1–2 times"; and "never used." Second: "In the past, which of the following procedures have members of your family and/or your friends or neighbors had personal experience with in a land use situation?" The same response scale was used.

c. Consensus. We asked a series of questions to assess the extent to which views about different procedures were widely shared.

i. Ideology. The first ideological evaluation involved respondents' liberal-conservative orientation. Two items were used, each with a seven-point response scale: "When it comes to political and social issues, how would you describe yourself (extremely liberal–extremely conservative)?" and "In terms of politics, how would you describe yourself (strongly Republican–strongly Democratic)?" The two items were highly correlated ($r = 0.82$), so they were combined to form a single index ($\alpha = 0.90$). Ideologically, the sample varied a great deal. Forty percent were liberal, 30 percent moderate, and 30 percent conservative. Similarly, 29 percent were Republican, 26 percent moderate, and 45 percent Democratic.

Trust in local government was measured using a multi-item scale. The items were: "Would you agree or disagree that you have confidence in the people running the following institutions?": "Your local government leaders"; and "Your local government staffers"; and do you agree or disagree that: "You can usually trust your local government to do what is right"; "You are generally satisfied with the actions of local government regarding land use"; "You feel that local government is run for the equal benefit of all the people in your community"; "When you participate in local government your views are listened to"; "Local government is too strongly influenced by special interests looking out for themselves" (reverse scored); "The actions of local government are often frustrating" (reverse scored); "People like yourself have too little influence in local government" (reverse scored); and "There is not much about your local government that you feel proud of" (reverse scored). Each item used a six-point response scale ranging from "strongly disagree" to "strongly agree." The 10 items were combined into a trust in local government scale ($\alpha = 0.92$).

Trust in state government was measured using a three-item scale with the same six-point set of response alternatives noted above. The items were: "Would you agree or disagree that you have confidence in the people running the following institutions": "The executive branch of the Florida State government"; "The Florida Legislature"; and "Regulatory agencies of the State government." The three items were combined into a trust in state government scale ($\alpha = 0.70$).

Respondents were also asked about their trust in two nongovernmental actors: nongovernmental organizations and the development community. Single-item indices of both types of trust were included. All used the "strongly disagree" to "strongly agree" set of response alternatives.

ii. Ties to the community. The respondents' identification with the community was measured using a nine-item scale that measured: identification with the community, pride in

the community, and believing that one is respected by the community. The items were: "Being a member of your local community is important to the way that you think of yourself as a person"; "You are proud to think of yourself as a member of your local community"; "There are many people in your community that you think of as friends"; "What your local community stands for is important to you"; "You often talk up your community as a great place to live"; "Most of the people in your community share your values"; "Most of the people in your community respect you and the way you live your life"; "People in your community generally recognize your contributions to the community"; and "Most of the people in your community respect your values." Respondents were also asked whether people in their community help each other. The items used to make this assessment were: "People in your community would help you if you needed it"; "In an emergency you could count on others in your community"; "The people in your community generally consider everyone's needs when making community decisions"; and "You can trust your neighbors to take account of your concerns when making community decisions." The items used the previously outlined set of response alternatives, ranging from "strongly disagree" to "strongly agree." The items were all combined into a single index reflecting each respondent's links to his or her community ($\alpha = 0.89$).

iii. Position in the community—interests. Four groups were defined: government (elected official, planning/zoning board member, local government staff, and state or regional agency staff; $N = 38$); citizen (member of a citizen's group, civic group, neighborhood association, or environmental group; $N = 71$); owner (property owner, developer, farmer, businessperson, realtor; $N = 33$); and professional (attorney, consultant, $N = 42$). The 44 remaining respondents were unclassified.

iv. Demographics. Finally, we consider standard demographic information: race, income, education, gender, and age.

d. *Procedurality—Bases for Acceptability.* People were asked a series of questions on procedural elements to assess the degree to which they believe that a particular procedural attribute is associated with a procedure (see Tyler 1988; Tyler & Lind 1992). This includes thinking that a procedure will enable them to win, and believing that the decision-making aspects of the procedure are fair, that is, believing that they will have an adequate chance to make their arguments and thinking that the decision will be made neutrally, and that the procedure involves high-quality interpersonal treatment of those involved in it (i.e., believing that they and their rights will be respected and believing that the procedure will allow them to evaluate the trustworthiness of the decisionmakers). In each case, respondents were asked whether a procedure had the element mentioned using response alternatives ranging from "disagree strongly" to "agree strongly."

- *Likelihood of winning.* "This procedure gives you some control over the outcome"; and "This procedure allows you to achieve the outcome you want" (average α 0.93).

- *Procedural justice*
 - *Voice*. Two questions: "This procedure provides people an adequate opportunity to present their arguments to the decision maker(s)"; and "This procedure gives people an adequate opportunity to make their points."
 - *Neutrality*. Three questions: "This procedure will lead to a decision that accurately reflects laws and regulations"; "This procedure will lead to a decision based upon a consideration of the facts"; and "This procedure will lead to a decision reflecting a consistent application of the law and applicable regulations."
 - *Trust*. Four questions: "This procedure gives people the information they need to determine whether they can trust the motives of others involved in making the decision"; "This procedure gives people the opportunity to easily obtain information relevant to the substance of the proposals being considered"; "The reasons for the decision will be adequately explained [in this procedure]"; and "This procedure takes account of the needs and concerns of people like you."
 - *Respect*. Two questions: "This procedure adequately protects people's rights" and "This procedure treats people with dignity and respect."

The procedural justice items were combined into an overall procedural justice scale. The average reliability across the five procedures was 0.97.

e. Nonjustice Issues. Four questions measured nonjustice issues: "This procedure is too costly for people like you to participate in"; "This procedure is scheduled at times of the day that make it hard for people like you to participate"; "This procedure takes too much time for people like you to participate"; and "This procedure takes too long to make a decision" (average alpha 0.85).

C. Results

1. Acceptability

One approach to examining the legitimacy of procedures is to look at whether or not people say they are willing to accept the outcomes of those procedures. Forty-nine percent expressed willingness to accept negotiated solutions; 46 percent public hearing solutions; 60 percent administrative litigation; 75 percent court hearings; and 61 percent referenda. These percentages suggest that the use of a particular procedure matters. By using court hearings, for example, the acceptability of a decision increases from 49 percent to 75 percent, a 26 percent increase. Hence, these findings very much support the argument that choosing different procedures will matter in terms of the acceptability of the outcome.

Table 1 shows the mean acceptability of each procedure, as determined by people's indication of their willingness to defer to that procedure by accepting its outcomes. The scale ranges from 1–6, with high scores indicating a greater willingness to defer. The results of a *t* test indicate that people judge three procedures to be significantly more acceptable than private negotiation (mean = 3.24): adjudication (mean = 4.05); administrative law hearings (mean = 3.58); and public referendums (mean = 3.69). Public hearings (mean = 3.19) are viewed as the least acceptable of the five procedures we studied and are

Table 1: Mean Acceptability

	Mean	Comparison to Negotiation	
		t Test	Wilcoxon Test
Negotiation	3.24 (186)	—	—
Public hearing	3.19 (221)	$t(185) = 0.42$	$z = 0.52$
Administrative law hearing	3.58 (186)	$t(169) = 3.50^{***}$	$z = 3.31^{***}$
Judicial adjudication	4.05 (187)	$t(175) = 6.74^{***}$	$z = 5.96^{***}$
Public referendum	3.69 (188)	$t(175) = 2.13^*$	$z = 2.09^*$

NOTE: The scales range from 1 to 6, with 1 indicating “strongly disagree” and 6 indicating “strongly agree.” $*p < 0.05$; $**p < 0.01$; $***p < 0.001$. The number in parentheses in the Mean column is the number of respondents who provided responses on the two procedures being considered.

not viewed as more acceptable than negotiation among the parties (i.e., private ordering).¹¹ Because the distribution of acceptability for courts showed significant skewness, the analysis was replicated using a nonparametric Wilcoxon signed ranks test, which is not based on assuming a normal distribution. As is shown in Table 1, the results are the same.

The greater acceptability of third-party procedures is striking in light of Thibaut and Walker’s (1975) arguments about people’s desire to keep control of outcomes. However, Thibaut and Walker note that people willingly seek third-party control over decisions when they believe it is needed to resolve disputes. Further, other researchers also find support for third-party control. For example, Hibbing and Theiss-Morse (2002) suggest that people often do not want to be involved in political decision making; instead, they prefer to have authorities make decisions. However, they only defer to authorities when they believe that decisions will be fairly made.

2. Robustness

We first examined the influence of personal experience with procedures on their acceptability. The results are shown in Table 2. They indicate that in no case did experiencing a procedure lead to more negative views about that procedure. Adjudication was also found to be desirable in that those people who used adjudication rate it as more acceptable than do nonusers ($t(185) = 2.35$, $p < 0.05$; see Table 2). Adjudication is the only procedure that differs significantly in acceptability between users and nonusers, suggesting that, in general,

¹¹Because adjudication is the most acceptable procedure, we can ask whether it is more acceptable than other procedures. An analysis suggests that adjudication is more acceptable than a referendum ($t(175) = 1.98$, $p = 0.05$); administrative hearings ($t(174) = 4.94$, $p < 0.001$); negotiation ($t(175) = 6.74$, $p < 0.001$); and political hearings ($t(185) = 7.01$, $p < 0.001$).

Table 2: Robustness—Personal Experience and Acceptability

	<i>Those With Personal Experience (N)</i>	<i>Those Without Personal Experience (N)</i>	<i>Comparison</i>	
			<i>t Test</i>	<i>Mann-Whitney</i>
Negotiation	3.28 (160)	3.04 (26)	$t(184) = 0.82$	$z = 1.08$
Public hearing	3.19 (211)	3.20 (10)	$t(219) = 0.02$	$z = 0.05$
Administrative law hearing	3.68 (124)	3.37 (62)	$t(184) = 1.38$	$z = 1.58$
Judicial adjudication	4.28 (97)	3.81 (90)	$t(185) = 2.35^*$	$z = 2.42^*$
Public referendum	3.94 (71)	3.53 (117)	$t(186) = 1.52$	$z = 1.53$

NOTE: The scales range from 1 to 6, with 1 indicating “strongly disagree” and 6 indicating “strongly agree.” $*p < 0.05$; $**p < 0.01$; $***p < 0.001$.

Table 3: Robustness—Indirect Experience and Acceptability

	<i>Those With Indirect Experience (N)</i>	<i>Those Without Indirect Experience (N)</i>	<i>Comparison</i>	
			<i>t Test</i>	<i>Mann-Whitney</i>
Negotiation	3.22 (144)	3.33 (42)	$t(184) = 0.49$	$z = 0.33$
Public hearing	3.16 (190)	3.35 (31)	$t(219) = 0.64$	$z = 0.66$
Administrative law hearing	3.44 (106)	3.75 (80)	$t(184) = 1.45$	$z = 1.69$
Judicial adjudication	4.03 (95)	4.08 (92)	$t(185) = 0.21$	$z = 0.14$
Public referendum	3.90 (71)	3.50 (117)	$t(186) = 1.77$	$z = 1.70$

NOTE: The scales range from 1 to 6, with 1 indicating “strongly disagree” and 6 indicating “strongly agree.” $*p < 0.05$; $**p < 0.01$; $***p < 0.001$.

personal experience is not a strong influence on evaluations of the willingness to accept a procedure. A nonparametric analysis (Mann-Whitney test) shows similar results.

It is also possible to consider the influence of indirect information about a procedure. To explore the influence of indirect experience on procedural acceptability respondents were asked whether their family, friends, or neighbors had used particular procedures. A comparison is shown in Table 3. As Table 3 indicates, those who have friends, family, or neighbors who have used various procedures do not differ in their judgments of their acceptability. A nonparametric analysis (Mann-Whitney test) shows similar results.

The only procedure influenced by information from one’s own or others’ experience is adjudication, with those having more personal familiarity expressing greater willingness to accept decisions made through courts. Hence, adjudication is the most desirable procedure in terms of its robustness.

Table 4: Consensus—Antecedent Influences upon Acceptability

	<i>Negotiation</i>	<i>Public Hearing</i>	<i>Administrative Hearing</i>	<i>Judicial Adjudication</i>	<i>Referendum</i>
Political ideology	-0.04	-0.07	-0.14	-0.12	-0.04
Views about local government	0.31***	0.48***	-0.03	-0.12	-0.31***
Views about state government	0.12	0.10	0.32***	0.25*	0.12
Views about NGOs	0.16	0.06	0.05	-0.18	0.16
Views about developers	0.17	0.12	0.04	0.03	0.17
Identification with community	-0.05	0.03	-0.07	0.24*	-0.05
Government official	-0.01	0.00	-0.09	0.15	-0.01
Interested citizen	0.01	-0.04	-0.06	0.14	0.01
Property owner	-0.02	0.13	0.07	0.02	-0.02
Lawyer and consultant	0.09	0.09	0.30*	0.18	-0.04
Age	-0.04	-0.17*	-0.13	-0.05	-0.04
Education	-0.05	-0.22*	-0.11	0.23*	-0.05
Income	0.14	0.08	0.05	0.01	0.14
Race	-0.03	0.00	0.06	-0.03	-0.03
Gender	-0.04	-0.09	-0.11	-0.13	-0.04
Familiarity	-0.02	0.00	0.04	0.10	-0.02
Adj. R^2	18%	33%	21%	13%	18%

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

NOTE: High scores indicate that people will accept a decision from a particular procedure. It also means they are conservative, like government and feel it should be involved, identify with their community, think neighbors will help and do care, are either a government official (38), citizen (71), owner (33), or lawyer/consultant (42). All significant effects are shown.

3. Consensus

In comparing the procedural preferences of different types of people, we distinguish between four features that might divide people. Those are ideology/views about government; ties to the community; position in the community/interests; and demographics.

The first question is whether these factors shape the acceptability of different procedures. An ideal procedure would *not be* impacted by these factors, so little variance in procedural acceptability would be explained by these respondent features. If these factors explain a large amount of variance in acceptability, it suggests that acceptability is not constant across people in the study.

A comparison of the five procedures using OLS regression indicates that the least amount of variance in acceptability is explained by antecedent factors with adjudication (13 percent; see Table 4).¹² This is less than is found with negotiation (18 percent), referendums (18 percent), administrative hearings (21 percent), and political hearings

¹²Before using OLS regression, an effort was made to examine whether the data met appropriate underlying assumptions. In each case, the residuals were graphed and examined. Because it is a skewed variable, the court acceptability analysis was also conducted using a dichotomized dependent variable, resulting in approximately the same explanatory power (8 percent). It is also important to note that the different dependent variables in the equations for each procedure use the same wording but refer to distinct procedures. This needs to be considered when comparing columns.

(33 percent). These findings suggest that public hearings are an especially problematic procedure from the perspective of the influence of antecedent conditions on the willingness to accept results.

The findings concerning antecedent conditions suggest that respondents' trust in government is a key issue in their judgments about procedures. If people trust local government, they are more supportive of using negotiations and public hearing procedures, and less supportive of referendums. If they trust state government, they favor administrative hearings and judicial adjudication. Ideology generally had little influence on judgments.

Ties to the community led to support for adjudication. In terms of interests, lawyers and consultants favored administrative legal solutions. Older respondents opposed public hearings. Finally, the highly educated also opposed public hearings and favored adjudication.

It is striking that familiarity is not linked to the acceptability of any of the procedures. Hence, in general, whether people had personal experience with a procedure had little to do with whether they would accept its outcomes. This is consistent with the previously reported weak influence of personal experience on acceptability.

4. Procedurality

An additional concern in evaluating procedures is with the degree to which procedures gain their acceptability on procedural grounds, rather than because they are anticipated to yield favorable outcomes. A desirable procedure is one that is legitimate for procedural reasons, independent of its anticipated outcomes, since it is unlikely that any procedure can give everyone the outcomes they want.

To test the procedurality of the different approaches we can directly compare the influence of procedural justice and two instrumental issues—the likelihood of winning and nonfairness issues—on acceptability for each of the five procedures controlling for background factors. To do this analysis, the four procedural indices were combined to form an overall index of procedural justice.

A regression analysis that examines procedural justice influences on acceptability (see Table 5)¹³ indicates that the justice of procedures is always a significant independent influence on their acceptability. Interestingly, there are two “pure” procedures in the sense that only procedural issues shape their acceptability: adjudication and administrative hearings. The other procedures are influenced by both procedural and outcome judgments.

¹³As before, residuals were graphed and examined. Further, the relationships between procedural justice, instrumental judgments, nonfairness judgments, and the dependent variables were tested for linearity. Finally, an analysis using a dichotomized dependent variable for court acceptability produced findings consistent with those shown. The possibility of multicollinearity was also considered. The correlation among three judgments—procedural justice, instrumental judgments, and nonfairness criteria—was calculated for each of the five procedures. Across the five procedures, the average correlation was 0.50, which does not suggest that there were problems of this type.

Table 5: Procedurality—Anticipated Outcomes, Procedural Justice, and Acceptability

	<i>Negotiation</i>	<i>Public Hearing</i>	<i>Administrative Hearing</i>	<i>Judicial Adjudication</i>	<i>Referendum</i>
Outcomes	0.34**	0.26*	-0.10	0.17	0.43***
Nonfairness issues	-0.02	-0.04	-0.05	-0.02	-0.02
Procedural justice	0.47**	0.53***	0.81***	0.53***	0.37***
Political ideology	0.00	-0.03	-0.10	-0.09	-0.05
Views about government—L	0.13*	0.12	-0.11	-0.05	-0.07
Views about government—ST	0.05	0.03	0.05	0.09	-0.07
Views about NGOs	0.06	0.00	0.00	-0.02	0.07
Views about developers	-.01	-0.10	0.01	-0.18*	-0.02
Identification with community	-0.11	0.02	-0.04	0.15*	0.06
Government official	0.06	-0.01	-0.06	0.11	-0.04
Interested citizen	0.02	-0.05	-0.06	0.03	0.01
Property owner	0.07	0.12	0.08	0.02	0.00
Lawyer and consultant	0.06	0.05	0.03	-0.04	0.00
Age	0.08	-0.10	-0.10	-0.01	0.03
Education	-0.08	-0.11	-0.10	0.17*	-0.05
Income	0.15*	0.08	0.09	0.01	0.03
Race	-0.03	-0.03	0.03	-0.02	0.08
Gender	-0.02	-0.07	-0.08	-0.07	-0.10*
Adj. R^2	68%	66%	67%	48%	76%

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

NOTE: High scores indicate that people will accept a decision from a particular procedure. It also means they are conservative, like government and feel it should be involved, identify with their community, think neighbors will help and do care, are either a government official (38), citizen (71), owner (33), or lawyer/consultant (42). All significant effects are shown.

This same pattern also emerges if we consider only those respondents with prior personal experience with the procedures (Table 6).¹⁴

These findings suggest that procedures can be evaluated by the degree to which they are pure procedures, whose acceptability is linked to procedural issues and not to their anticipated outcomes. When such an evaluation is made, administrative and adjudication procedures emerge as very desirable. To a striking degree, people indicate a willingness to accept their outcomes on procedural grounds, to the extent that they are unaffected by the anticipated outcomes in the case of administrative hearings. Judicial adjudication also emerges as a very desirable procedure on the same grounds.

Of the other procedures, political hearings emerge as second-tier procedures in terms of procedurality. They are dominated by procedural evaluations, although they have secondary influences of anticipated outcome. The final two procedures—negotiation and referendums—are about as strongly influenced by their anticipated outcome, with referendums the only procedure in which outcomes matter more than procedural features. Hence, referendums are an especially poor choice for decision making on procedurality grounds.

¹⁴In the case of the referendum, some minor differences emerge, since most respondents have no personal experience with this procedure and the resulting subsample is small.

Table 6: The Overall Influence of Procedural Justice on Acceptability: Those With Personal Experience

	<i>Negotiation</i>	<i>Public Hearing</i>	<i>Administrative Law Hearing</i>	<i>Judicial Adjudication</i>	<i>Referendum</i>
P(win)	0.40***	0.24**	−0.02	0.18	0.27*
Nonfairness issues	−0.03	−0.05	−0.05	0.01	−0.05
Procedural justice	0.42***	0.53***	0.82***	0.46***	0.57**
Adj. <i>R</i> ²	68%	66%	68%	36%	70%
Number with experience	188	215	142	109	86

p* < 0.05; *p* < 0.01; ****p* < 0.001.
NOTE: All effects are shown. This table omits the background factors shown in Table 5, which were included as controls in this analysis, but are not shown in the table.

Table 7: Procedural Evaluations Based on Nonfairness Criteria

	<i>Negotiation</i>	<i>Public Hearing</i>	<i>Administrative Law Hearing</i>	<i>Judicial Adjudication</i>	<i>Referendum</i>
Mean acceptability	4.04 (0.93)	3.69 (1.20)	3.01 (1.26)	2.54 (1.15)	3.37 (1.17)

NOTE: High scores indicate that a procedure does not have problems of cost and delay. All the third-party procedures are significantly less desirable on nonfairness grounds.

5. Nonjustice Issues

An examination of Table 5 indicates that nonfairness issues do not significantly influence the acceptability of any of the procedures (cost, delay). This is interesting because an examination of the mean on nonfairness concerns, shown in Table 7, gives high scores on nonfairness issues to negotiation and the worst scores to adjudication. While respondents give adjudication poor marks for cost, convenience, and so forth, evaluations on these dimensions are unrelated to whether the results of a procedure would be accepted. Table 6 shows the results of this analysis among only those who have personally experienced each procedure. The results are the same.

Adjudication is a less desirable procedure in terms of its cost, inconvenience, and time to decision. However, the respondents, while recognizing these negatives, do not consider these issues when deciding whether a procedure is desirable.¹⁵ This supports our general suggestion that peoples’ primary concern is that “justice be done” and, while they recognize issues such as cost and inconvenience, they prefer procedures that deliver justice, even if they have collateral costs. This concern for justice may be particularly central to evaluations of procedures that are being put in place to manage future disputes. Studies of

¹⁵Procedural desirability could be thought of as a tradeoff between justice and other issues, such as cost and delay, but these findings suggest that respondents are not making such a tradeoff. Rather, they are simply evaluating procedures in terms of justice.

people with personal experiences in court about cases in which they were involved finds that issues of cost influence evaluations of the courts (Rottman 2005), although such influences are found to be small (Rottman 2005; Tyler 2001).

6. Limitations in Our Results

We believe our findings offer important insights for the design of decision-making processes; however, we note several qualifications. We previously have suggested that key contextual issues have the potential to influence preferences, such as the stakes involved in a decision, the contentiousness of the issues, and the clarity of the outcome, as well as the capabilities of likely interested parties, among others (Markell & Tyler 2008). We did not explore in this study the possible impact of these types of contextual differences on process preferences. For example, we asked about the general category of rezoning requests but did not seek to distinguish between and among process preferences based on the significance of such requests (e.g., we did not seek to distinguish between a relatively limited rezoning, such as a rezoning of a single parcel, vs. a more significant rezoning, such as the rezoning of a substantial part of a community; or, similarly, any difference in preferences between a relatively confined rezoning from single-family residential use on one-acre parcels to such use on half-acre parcels, compared to a more dramatic rezoning from single-family residential to industrial or apartments). It is certainly possible that people's preferences would vary based on these types of contextual differences, as the efforts of the courts to make distinctions in standard of review and so forth based on such differences attest (*Board of County Commissioners of Brevard County v. Snyder* 1993). Of course, community members do not know what issues will become important in the future when they institutionalize a conflict management procedure for making policy decisions, so our approach mirrors the external world. Nonetheless, follow-up research would be valuable to explore the impacts on preferences of these contextual variables.

Other contextual differences may shape preferences as well. For example, it may well be that respondents would prefer different procedures for different aspects of the regulatory process. People might have different preferences, for instance, for processes used to make policy-making decisions (e.g., what do we want our community to look like, including what types of land uses within our community do we want to encourage), compared to processes used to make parcel-specific decisions (e.g., should we allow a property zoned residential to be rezoned for commercial use, or should we allow a variance to permit uses of a particular property that are inconsistent with zoning requirements). Even the same entity may make different types of decisions depending on the issues before it. In our specific context, notably land-use decision making in Florida, for example, local governments may act in a "legislative capacity" in some cases (e.g., enactment of original zoning ordinances) and in a "quasi-judicial" capacity in others (e.g., the "application of a general rule of policy") (*Board of County Commissioners of Brevard County v. Snyder* 1993).

A related possible aspect of context that could shape preferences is that significant variations exist among each of the types of procedures we studied (Hibbing & Theiss-Morse 2002). It is obviously possible that preferences would differ for different variations of the

same types of processes. There is not just one way to conduct an administrative hearing or a public hearing. Judicial adjudication includes appellate argument and trial-type proceedings. Similarly, an enormous range of possible variations in aspects of the adjudication may affect preferences, such as the standard of judicial review, who has the burden of proof, and the like. Again, this is the case in the specific context of land-use decision making in Florida as in others (*Board of County Commissioners of Brevard County v. Snyder* 1993). In addition, there is the possibility that despite our inclusion of descriptions of the processes we were asking about, familiarity with variations of these processes may have affected the preferences expressed. From a study design perspective it is not possible to capture all possible nuances of each type of procedure, so we sought to create a prototypical version of each type of procedure.

Further, the evaluations of concern here are *ex ante* evaluations of procedures in which the respondent may or may not be or expect to be personally involved. This study, in other words, is concerned with *ex ante* judgments about the desirability of procedures as ways to make decisions about land use in one's community. It concerns community governance, not private disputes. Although we did ask about *postuse* evaluations, and found that respondents' views concerning the desirability of procedures generally do not change with use, as we have noted at various points, the traditional procedural justice literature focuses heavily on the satisfaction of the consumers of legal services, and *ex post* judgments of the type studied in that literature may be quite different because they involve evaluations of a single use of a procedure that involved the respondent's own case.¹⁶

And, finally, our choice of respondents, and our approach to circulating the survey instrument, highlight a broader question, notably: Whose views are relevant to questions concerning governance structure? Is it the general public? Is it members of the public with a particular level of interest in the questions at issue? Or is it the group that is most likely to actually participate, that is, activists? As noted in Section III, in this effort we focused on individuals and organizations that were most likely to participate in the procedures we identified. For some purposes, investigations of the views of broader, random cross-sections of the population are obviously appropriate. This issue is an important one for methodological design.

D. Discussion

This article explores public views concerning the acceptability of different procedures for regulating land-use decisions. The respondents are Florida stakeholders from communities in which these land-use decisions are being made. Each respondent is asked to evaluate five alternative procedures for making land-use decisions—four procedures in

¹⁶There is a parallel literature on procedural justice in work settings. Within that literature, employees are often asked to evaluate the overall fairness of the procedures in their workplace, as well as the procedures they have personally experienced (see Tyler & Blader 2000). That literature suggests that similar issues define procedural fairness at both levels.

which possible decisions are regulated in some manner by the larger community, and one procedure involving unregulated negotiation among the parties directly involved in the land at issue.

This study begins with the premise that if land-use decisions are to be regulated, it is important to consider public views about how that regulation should occur. Legitimacy is a key to effective and sustainable governance (Jost & Major 2001; Tyler 2006b); our premise is that soliciting, understanding, and incorporating public views about the appropriate shape and content of regulation will help enhance the legitimacy of governance in general and the relevant government processes in particular.

In this article, we suggest a five-part conceptual framework for considering public views concerning different processes for making decisions with public impacts. One obvious place to start is to ascertain public views about the acceptability of decisions made using different procedures. Acceptability is one aspect of overall legitimacy, and the aspect perhaps most central to the authoritativeness of a procedure (Tyler 2007). As Table 1 and the accompanying discussion reflect, adjudication is the most acceptable procedure, with administrative law hearings and public referendum deemed more acceptable than negotiations as well. Public hearings are the only public procedure not considered preferable to private negotiations.

We believe this initial set of findings is of interest for at least six reasons. First, the finding that judicial adjudication is acceptable to many respondents is consistent with the literature, which has found that the court system has a cushion of support (Gibson et al. 1998). People are generally willing to defer to decisions made in courts, although such deference is obviously not universal.

Second, the distinction respondents draw between judicial and administrative adjudication is relevant to how and where adjudication is conducted—which courts, if you will, should hear different types of cases. While they do not receive as much attention, administrative tribunals in the United States far outnumber their better-known state and federal judicial counterparts. According to the Office of Administrative Law Judges, administrative law judges outnumber their counterparts by roughly three to one. A substantial amount of adjudicative work has been “outsourced” to agencies (Resnik 2006; Mullins 1991). There are normative debates about the relative advantages and disadvantages that judicial and administrative tribunals provide. Administrative adjudicative bodies are thought to be more accessible because of their relative informality, and also are thought to be preferable in some cases because of their greater efficiency (Carlisle 1986). On the other hand, since the high-water mark days of *Goldberg v. Kelly* (1970), the corollary has been that the “federal template” for adjudication procedures has not always been applied in the administrative context (Pierce 2009; Resnik 2006). Further, there may be legal and practical limitations in public access to administrative proceedings and to the decisions they produce (Resnik 2006). This normative debate about the types of cases administrative bodies should be empowered to hear should also be informed by the public’s preferences (see Mashaw 1985). For example, some studies suggest that people like the formalities associated with judicial litigation (Hensler 2002; Lind et al. 1990). Additional research to understand the reasons for and extent of such preferences would be helpful to informing debates about the types of issues we have outlined above concerning the appropriate roles

and structures of different facets of our court system, including its judicial and administrative components.

In addition, public preferences arguably should inform the debate about a range of other issues of enormous importance to the shape and operation of our adjudicatory apparatus. For example, there are questions about the types of relief administrative adjudicative bodies should be able to award (*McHugh v. Santa Monica Rent Control Board* 1989; *Wong Wing v. United States* 1896), and about the impact of administrative decisions on court jurisdiction (e.g., the circumstances in which an administrative decision should foreclose reconsideration of the issues involved by a court, and exhaustion of administrative remedies) (*University of Tennessee v. Elliott* 1986; *Reiter v. Cooper* 1993). In short, while some of these issues raise constitutional questions, others are susceptible to legislative or other tinkering. The debate over possible reconfigurations would, again, benefit from understanding of public preferences.

In addition to questions concerning the appropriate parameters for judicial and administrative forums, there are questions concerning the appropriate shape or structure of administrative tribunals that might benefit from more sophisticated understanding of public preferences. For example, the issue of whether jurisdictions (e.g., the federal government and the different states) should centralize their administrative forums or maintain de-centralized structures has received considerable attention in the literature and, in recent years, several jurisdictions have changed their structures (Hardwicke 2001).

The level of support for judicial and administrative adjudication raises basic questions about the operation of our court system and, in particular, about its accessibility. For example, several doctrines limit access to the courts and to agency adjudication tribunals, such as the requirement of fees, standing, and ripeness (Resnik 2006; *Massachusetts v. EPA* 2007). Others, such as the recoverability of attorney fees, similarly have very real practical consequences for the availability of the courts to resolve disputes (*Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* 2001). One question the findings raise is whether public preferences should inform these legal doctrines, some of which have constitutional roots and therefore have limited flexibility, but others of which are prudential or shaped by legislation, and therefore are more amenable to change (*Bennett v. Spear* 1997; Resnik 2006).

The level of support for public referendums (more acceptable than public hearings and private negotiations and less acceptable than judicial or administrative adjudication) should be of interest to proponents of referendums and skeptics as well. There is a significant ongoing debate about the merits of referendums and their place within our system of governance (Selmi 2002). There is support in our findings for different perspectives, but they do not suggest that people generally prefer referendums to traditional legal procedures. Our hope is that our framework, and these results, will provide impetus for further work in this area.

Fifth, the finding that fewer than one-half of respondents believe public hearings are an acceptable way of resolving land-use issues, and the finding that such hearings are less acceptable than any other public procedure, should be cause for concern for those interested in legitimacy of local governance. Local governments rely heavily on public hearings in making land-use decisions in Florida (Nelson 1995; Brody et al. 2003). Thus, widespread

dissatisfaction with such hearings raises a red flag about one of the main ways local governments interact with their citizenry.

Our speculation is that respondents' dissatisfaction stems from their viewing public hearings as pro forma in practice, and not where real decision making occurs. In procedural justice terms, they do not trust that the consideration of their views that is occurring is sincere, so they do not trust the decisionmakers (Tyler & Kramer 2006). Further, respondents may have been expressing skepticism about the value of public comments during such hearings (Hibbing & Theiss-Morse 2002) or, perhaps, skepticism about whether participants generally are well-informed and offer normatively helpful input, although this issue is generally unexamined in the procedural justice literature.

We also believe there are other possible explanations, such as the distaste for participating in contentious processes in which diverse opinions are aired (Hibbing & Theiss-Morse 2002). Hibbing and Theiss-Morse (2002) note that people dislike the conflict associated with involvement in politics, but want a chance to voice their concerns to authorities. Some forms of political hearing take this into account and create procedures that provide voice but lower the level of interpersonal conflict. For example, in electronic balloting, participants can communicate their views and those views are aggregated and shown on a screen. So people can have voice without conflict in the sense that they do not need to deliberate and try to find generally acceptable solutions through interpersonal conflict. In general, it is important to distinguish having voice from being involved in deliberation. In a trial setting, each party addresses the judge, but they do not interact with each other. This is a reflection of Hibbing and Theiss-Morse's idea that people want a neutral third party to make decisions. A jury, in contrast, is based on the idea that people actually deliberate, rather than simply vote. Such deliberation has the messy and conflictual features of decision making that people apparently find disturbing (as anyone who has watched *Twelve Angry Men* can easily understand). The fundamental procedural design issue is whether people want to have voice or deliberation or both in a procedure.

As a practical matter, we anticipate that this finding of disaffection with public hearings ultimately may be the most important result of the study. Little other work has been done to explore the public's views concerning the acceptability of public hearings either ex ante or ex post. The existence of widespread disaffection should lead researchers and others to investigate why public hearings enjoy so little support, and how public hearings can be improved to win greater support. Thus, these findings warrant further research, first to gauge their replicability, but also to explore why public hearings have such a significant public perception problem, and whether steps can be taken to improve the acceptability of such hearings. In their provocative work, Hibbing and Theiss-Morse point in one possible direction, notably, that people "want the individuals who make political decisions to be empathetic, non-self-interested decision makers (ENSIDs). And while empathy is nice, ridding the system of self-interested behavior is more important" (Hibbing & Theiss-Morse 2002).

And, sixth, we believe our findings pose interesting questions for the shape of administrative governance more broadly, beyond the local level. In the contemporary administrative state, agencies tend to make binding decisions using one of two types of processes. Agencies either use their adjudicatory authority to make decisions, or they make

decisions through their rule-making powers (Pierce 2009). This is, of course, a gross simplification (Croley 1998), but nevertheless captures key features of the operation of the administrative state. Agencies consider a range of strategies in deciding whether to use adjudication or rule making to establish policy (Pierce 2009). Although the local government public hearings we study in this project differ substantially from the notice-and-comment rule making most agencies use to formulate rules, the range in acceptability we found suggests that there is fertile ground for researching public acceptability as part of ongoing efforts to improve agencies' choice of decision-making tools (Coglianese & Nash 2006).

As the article reflects, we believe that a more nuanced framework for considering acceptability beyond simply evaluating overall acceptability of different processes is helpful to informing understanding of public views relevant to legitimacy. We argue it is appropriate to consider four other criteria in reviewing possible procedures: robustness (whether a procedure is considered favorably by those who have used it—if so, this is likely to bolster its sustainability), consensus (involving the extent to which a procedure is well-regarded by a broad cross-section of the community as opposed to enjoying narrow support by a small segment of the relevant population), procedurality (the extent to which a procedure is preferred because of its perceived fairness rather than because of the outcomes it is anticipated to produce), and nonjustice issues (delay, cost, etc.).

The findings on robustness tend to bolster the findings concerning overall acceptability summarized above. Judicial adjudication is considered most desirable in that those people who used it rate it as more acceptable than do nonusers. Again, respondents appear to perceive judicial adjudication differently from the administrative variety. We think it is also of interest that in no case did personal experience with a procedure lead to more negative views. Our inclusion of robustness was to enable us to emphasize different perceptions. On the one hand, with acceptability, we wanted to assess the *ex ante*, abstract views about different procedures. With robustness, we wanted to evaluate perspectives about these same procedures based on real-world participation in them by the respondents or their family members or neighbors. We believe each type of preference is important and that it is especially helpful to evaluate them in tandem.

The findings on consensus again support judicial adjudication as the most preferred procedure. Again, the findings reflect that the respondents differentiate between judicial and administrative adjudication. They confirm our intuition that respondents who have confidence in government would be relatively strong supporters of public hearings and skeptics about referendums.

We believe there is a need for theorizing regarding the salience of consensus as a variable. Many of the same issues raised about procedural justice itself can also be raised about consensus. Is there a normative model that would tell us which dimensions ought to receive consideration and which are not important? In many areas of governance, disparities due to racial- or gender-based biases are considered suspect, but is there a larger framework for addressing such concerns? In other words, ought the acceptability of a procedure across liberal and conservative political views be a special concern? What about agreement across levels of income or among developers and environmentalists, etc.?

Absent a normative model for addressing the question of appropriate criteria for consensus, we might also ask the same question politically. Whose buy-in is important from the pragmatic perspective of making decisions that actually work within the community? For example, whatever the normative merits of the *Roe v. Wade* (1973) abortion decision, it receives low marks as a decision that actually put a contentious political issue to rest. Similar concerns are relevant to decisions about land use. Whose consent is more relevant? We note that we treat all potential differences we identified as equally important in evaluating consensus.

Fourth, in terms of procedurality, the salient findings here are that: (1) each of the studied procedures “does well” under this criterion in the sense that respondents consider the fairness of the process in evaluating its acceptability; (2) in terms of being judged primarily in procedural terms, judicial and administrative adjudication do best; (3) again, respondents draw distinctions between judicial and administrative adjudication, though here administrative adjudication does best; and (4) referendums are the worst of the procedures studied in that they are not primarily evaluated in procedural terms.

Finally, the responses concerning nonfairness issues are of interest for several reasons. First, they appear to have had no effect on acceptability. Thus, adjudication is the most acceptable procedure despite the perception that it does worst in terms of the nonfairness concerns. In addition, we believe that the findings concerning the relative weight respondents attach to procedural justice versus outcomes versus nonfairness factors suggest an important insight concerning public hearings. Public hearings did the best of all public procedures in terms of the nonfairness factors we asked about (cost, accessibility, etc.). Yet, as we summarize above, public hearings are deemed less acceptable than any other public procedure. Further, as noted above, all the other public procedures do better than public hearings even though each of these other procedures does worse with respect to the nonfairness issues. This suggests that, at a practical level, attempted fixes to public hearings that focus primarily on cost of participation, accessibility, and so forth are not likely to pay off, although, of course, that does not mean that improvements in these nonfairness areas should be ignored. Instead, efforts to improve public hearings should focus on underlying procedural justice concerns given the importance respondents attached to these concerns in evaluating such hearings. Similarly, the nonfairness advantages of negotiation carried very little weight among respondents, who preferred more costly and inconvenient, but fairer procedures.

IV. CONCLUSION

A. Land Use

The desirability of the five procedures on each of the five criteria is summarized in Figure 1. A review of the rating of these procedures on the criteria noted—acceptability, robustness, consensus, procedurality, and nonfairness-related issues—suggests that the most desirable procedure in a situation in which a universal procedure is to be put in place is judicial adjudication. Following in desirability is the administrative law hearing. Other procedures also have desirable attributes, although none is as generally desirable as are the two legal

Figure 1: Summary procedural comparison.

	Negotiation	Public hearing	Administrative law hearing	Judicial adjudication	Referendum
1. The procedure is acceptable (relative to negotiation).	—		+	+	+
2a. The procedure is robust against experience (its use does not undermine its acceptability).	+	+	+	+	+
2b. Acceptability becomes greater with use.				+	
3. There is a consensus about desirability (background factors do not influence acceptability).				+	
4a. Acceptability is not linked to anticipated outcomes.			+	+	
4b. Acceptability is linked primarily to procedural features.	+	+	+	+	
5. Procedure is strong on nonfairness issues (cost, convenience, etc.).	+				

adjudication procedures. Of the seven criteria outlined in Figure 1, adjudication is superior in terms of six, and administrative law hearings in terms of four. The other procedures fare worse in this evaluation: political hearings (two); referendums (two); and negotiation (three).

The findings strongly support the argument that people want legal adjudication procedures to be in place. While, as private parties, people sometimes may resist legal control over their decisions, as members of the community people generally want to have a mechanism for public regulation to be in place, and they want that procedure to be the legal procedure of judicial adjudication. They prefer this legal procedure to political control, administrative hearings, and public control via referendums. As we have noted, this conclusion is similar to that of others studying political decision making who also find that people want authorities to make decisions (Hibbing & Theiss-Morse 2002; Tyler & Degoe 1995).

The strong support for adjudication is important because it suggests that people value the legal framework as an approach within which to make decisions about the

community. Public regulation could potentially be managed in a variety of ways, political, legal, and via referendum, and among those choices the respondents indicated a preference for judicial adjudication. Further, their second choice was also a legal procedure—administrative hearings.

We believe these findings are important at a number of levels. To highlight four we have elaborated on, they raise questions concerning the availability of the courts to adjudicate disputes and the legal doctrines that affect such availability. They also raise questions concerning differences between different types of adjudication, judicial and administrative, and the implications of these differences for the shape and use of these mechanisms. Third, they raise questions about the use of referendums and the role they should play in the land-use arena. And, finally, they raise questions concerning nonadjudicatory procedures and, in particular, local government's use of public hearings as its primary mechanism to elicit public input and to make decisions. To us, it is inevitable that nonadjudicatory procedures must retain an important place in the toolbox of governments as they make land-use policy; our findings suggest that there would be considerable value to improving understanding of the reasons for disaffection with current nonadjudicatory procedures and to pursuing opportunities to enhance the acceptability of such procedures.

B. Empirical Governance

Moving beyond the arena of land use, it is important to consider the implications of a procedural evaluation approach based on public judgments for developing a general model of empirical governance. This approach is important for several reasons. First, in a democratic society it seems self-evident that public views about procedural desirability ought to be considered when deciding how to manage issues in people's own communities. Second, the issue of authoritativeness, for example, the willingness of people to defer to the results of a procedure, is a key to the effectiveness of the law. If people are not generally willing to voluntarily defer to the decisions of authorities, then it is difficult to effectively regulate the actions of members of the public.

Our argument is that it is generally important to consider public views when deciding how to exercise public control over private and public actors. Here, we use this approach for understanding how to make land-use decisions, but we recognize that it has broader application. For example, Markell and Tyler (2008) similarly consider the public's views about the desirability of adjudication and other approaches to managing contested environmental noncompliance situations. Slobogin and Schumacher (1993) use it to examine public views about the intrusiveness of various forms of government intrusion into personal privacy. Robinson and Darley (1995) explore public views about appropriate sanctions for various types of criminal activity.

Although the arenas studied vary, all these investigators share our view that there are benefits when the law is consistent with public views about what is desirable and correct. Robinson and Darley (1995) argue that the law departs from congruence with public views at its peril, since it is more difficult to enforce laws that do not have the weight of public morality behind them (also see Robinson 2008; Robinson & Cahill 2006). This argument is

similar to our own suggestion, drawn from the literature on procedural justice (Lind & Tyler 1988), that people are more willing to accept decisions made through procedures they judge to be fair.

Of course, it does not necessarily make sense that the law should simply reflect public views without any other considerations. For example, Slobogin (1991–1992) argues that public views should be used to inform how the Fourth Amendment is implemented, but that the law should not necessarily be a simple reflection of public views. Similarly, Robinson and Darley (1995) argue that the criminal law should be sensitive to those areas in which a large gap exists between the actual law and public views about what is just. While not suggesting that the law simply bring itself into alignment with public views, the authors suggest that the law consider why discrepancies are found. We, of course, recognize the importance of other considerations, ranging from practical issues such as time and cost to requirements embodied in the Constitution that are, obviously, not easily susceptible to change.

In this analysis, we move beyond a simple comparison of public views and existing law. We address the question of how public views ought to be brought into the design of procedures. We argue that it is sensible, in doing so, to look beyond direct expressions of authoritativeness by considering other issues that we believe are important to the desirability of a procedure. For example, we argue that it is important that a procedure bridge across important groups in the community, for example, liberals and conservatives, environmentalists and developers. Thus, we believe it worthwhile to examine whether there is a general consensus in the community in favor of a procedure. This criterion is distinct from simply looking at the proportion of people in the community that view a particular procedure as legitimate.

Similarly, we argue that it is relevant to consider *ex post* perspectives concerning procedures to learn whether use of a procedure affects peoples' perspectives concerning its acceptability. A procedure that, when used, engenders complaints and disaffection, is less preferable than one that does not, even if, *ex ante*, levels of preference are similar. Third, we contend that "procedurality" is a relevant criterion in undertaking more sophisticated assessments of procedures that go beyond acceptability. We suggest that because of the "cushion" or "reservoir" effect and the inevitability in many cases that there will be losers as well as winners, procedures that are viewed as acceptable because of their perceived fairness deserve serious attention compared to procedures that are viewed as acceptable because, *ex ante*, people are hopeful they will win. And, finally, we argue that it is appropriate to consider the impact of "nonfairness" issues on acceptability. It is, in our view, helpful to identify, and isolate, concerns about access, cost, and the like in considering different types of procedures that are intended to attract citizen participation and produce decisions citizens will accept.

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SUPPORTING INFORMATION

Additional Supporting Information may be found in the online version of this article:

Survey; Citizen input into growth management decisions in Florida's communities.

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